STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2008
v	No. 275943 Gogebic Circuit Court
CHAD LEE BROWNELL, Defendant-Appellant.	LC No. 05-000410-FH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and the trial court sentenced him to two to 15 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

Defendant was convicted of engaging in sexual intercourse with the victim in approximately July 2000, when the victim was 13 years old. The victim testified that she and her friend were spending the night babysitting for her friend's niece when defendant, her friend's stepbrother, arrived home late and appeared intoxicated. According to the victim, defendant pushed her down on the couch and put his fingers and penis inside her vagina. Defendant's stepsister allegedly observed the assault, but failed to intervene. The defense theory at trial was that the assault never occurred.

II. Ineffective Assistance of Counsel

On appeal, defendant first argues that defense counsel was ineffective for failing to pursue an insanity defense based on involuntary intoxication. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for a *Ginther*[1] hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

The Sixth Amendment requires counsel to reasonably investigate all potentially viable defenses. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), lv pending. A defendant is denied the effective assistance of counsel when his attorney fails to investigate and present a meritorious insanity defense. *Id.* at 119.

Legal insanity is an affirmative defense to a crime in Michigan. *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001). In this case, however, there is no basis for concluding that a potentially meritorious insanity defense existed. An individual may be found legally insane only "if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." MCL 768.21a(1).

Defendant here does not contend that he had a history of mental illness or mental retardation affecting his mental capacity. Rather, he argues that defense counsel should have pursued an insanity defense based on intoxication. Although there was evidence that defendant was intoxicated from alcohol at the time of the offense, MCL 768.21a(2) expressly provides that "[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." To the extent that defendant argues that intoxication may be considered involuntary in extreme cases involving "chronic" or "pathological" alcoholism, whereby an individual loses all power to resist consumption of intoxicating substances, or excessive consumption of drugs or alcohol over the course of time so far erodes brain functioning that a person loses his capacity to conform his conduct to the requirements of the law, we simply note that no record evidence remotely suggests the presence of any such condition exists in this case. On the contrary, defendant's presentence report discloses that defendant does not have a substance abuse history, and it further indicates that defendant denied having any alcohol addiction problem.

Furthermore, the defense theory at trial was that the offense never occurred. According to defendant's presence report, defendant "adamantly denied" sexually assaulting the victim and claimed that he "never touched her." Thus, an insanity defense, apart from lacking factual support, would have been inconsistent with the defense theory at trial, and with defendant's own claim that he never assaulted the victim.

For these reasons, we find no merit to defendant's argument that defense counsel was ineffective for failing to investigate or pursue an insanity defense.

III. Admission of Statements

Next, defendant argues that the trial court erred by admitting into evidence (1) defendant's stepsister's prior statement during a police interview in which she admitted observing defendant sexually assault the victim, and (2) defendant's stepmother's prior statement

to a police officer in which she stated that defendant admitted engaging in sex with the victim, but denied assaulting her. Both witnesses denied making the prior statements.

The trial court determined that the prior statements were admissible for impeachment under MRE 613(b), and were also admissible as substantive evidence under MRE 804(b)(6) and (7). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

MRE 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." In this case, the prosecution offered extrinsic evidence that the witnesses gave prior statements that contradicted their trial testimony. Contrary to what defendant argues, the fact that the witnesses denied making the statements did not preclude their admissibility. The inconsistency of a previous statement "is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position." *People v Chavies*, 234 Mich App 274, 282-283; 593 NW2d 655 (1999). Further, both witnesses were afforded an opportunity to explain or deny the statements and defendant was afforded an opportunity to cross-examine the witnesses concerning the statements. Therefore, the trial court did not abuse its discretion in determining that the prior statements were admissible for impeachment.

The trial court also determined that the stepsister's prior statement was substantively admissible under MRE 804(b)(6), and that the prior statements of both witnesses were also substantively admissible under MRE 804(b)(7).

MRE 804(b) lists a series of situations in which a prior statement is not excluded by the hearsay rule if the declarant is unavailable as a witness. Unavailability is defined to include a witness's "lack of memory of the subject matter of the declarant's statement." MRE 804(a)(3).

The exception in MRE 804(b)(6) allows for the admission of

> [a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

MRE 804(b)(7) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure though reasonable efforts, and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's

intention to offer the statement and the particulars of it, including the name and address of the declarant.

With regard to MRE 804(b)(6), the stepsister was unavailable by reason of lack of memory concerning the prior statement. Further, there was evidence that defendant had told his stepsister not to tell anyone about the incident, and that the stepsister did not intervene because she was afraid that defendant would hit her. In light of this evidence, the trial court did not abuse its discretion in determining that the stepsister's prior statement was admissible under MRE 804(b)(6).

With regard to MRE 804(b)(7), defendant only challenges the requirement that the statements have equivalent circumstantial guarantees of trustworthiness. As the trial court observed, there was evidence that defendant had a close family relationship with his stepsister and stepmother. Further, that the prior statements related damaging facts about defendant, a close family member, and were made by persons who lacked any bias or motive to fabricate, enhances their reliability and trustworthiness. Also the stepsister's prior statement was made shortly after an emotional conversation with the victim, in which the stepsister agreed to tell someone what she knew about the assault if the victim wanted her to. Considering these circumstances, the trial court did not abuse its discretion in determining that the prior statements were also admissible under MRE 804(b)(7).

Further, we find no merit to defendant's argument that admission of the prior statements violated his constitutional right of Confrontation under the Sixth Amendment and *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). When hearsay evidence is admitted and the declarant cannot be cross-examined, the evidentiary ruling may implicate constitutional error under the Confrontation Clause. *People v Stanaway*, 446 Mich 643, 694 n 53; 521 NW2d 557 (1994). In *Crawford*, "the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, testimonial statements *of witnesses absent from trial* may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (emphasis added). The right of confrontation "is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford, supra* 61. In this case, the declarants, defendant's stepsister and stepmother, were available for cross-examination. Therefore, defendant was not denied his right of confrontation.

IV. Denial of Adverse Inference Jury Instruction

Next, defendant argues that the trial court erred by denying his request for an adverse inference instruction with respect to the stepsister's prior written statement, which could not be located for trial. Claims of instructional error are reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

An adverse inference instruction is not warranted absent a showing of bad faith by the police or prosecution in failing to produce evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). In this case, there was no evidence of bad faith in failing to produce the written statement. The statement was obtained by Trooper Maki in 2001, but subsequently

became lost after Trooper Maki left the department. It was unavailable because it could not be located. Although defendant attributes the loss to police incompetence, any alleged incompetence is not the equivalent of bad faith. Under the circumstances, the trial court did not err by denying defendant's request for an adverse inference instruction. *Id.*

V. Sentencing

Defendant also raises several claims of sentencing error, none of which have merit. Initially, we reject defendant's argument that the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by relying on facts not found by the jury to support its scoring of the sentencing guidelines variables. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676, 690; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 143, 153; 715 NW2d 778 (2006).

Defendant also challenges the trial court's scoring of several offense variables. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

The trial court scored ten points for offense variable (OV) 4, which directs that ten points are to be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The victim testified at trial that the assault caused her severe emotional trauma, which led her to see a counselor and a doctor for depression, and caused her to become suicidal. This evidence supports the trial court's ten-point score for OV 4.

The trial court scored ten points for OV 10, which directs that ten points are to be scored if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). At the time of the offense, the victim was 13 years old and defendant was 22 or 23 years old. The evidence supports the trial court's ten-point score based on defendant's exploitation of the victim's youth.

The trial court scored 25 points for OV 11, which directs that 25 points are to be scored if there is an additional criminal sexual penetration arising out of the sentencing offense. MCL 777.41(1)(b). The victim testified at trial that defendant inserted his finger into her vagina before penetrating her with his penis. Although the jury acquitted defendant of an additional count of digital penetration, a sentencing court "may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded an opportunity to challenge the information and, if it is challenged, it is substantiated by a preponderance of the evidence." *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). Here, the victim's trial testimony was sufficient to establish the additional act of penetration by a preponderance of the evidence. Therefore, 25 points were properly scored for OV 11.

Finally, defendant argues that his sentence is unconstitutionally cruel and unusual. US Const, Am VIII; Const 1963, art 1, § 16. We disagree. Defendant's two-year minimum sentence is within the sentencing guidelines range of 19 to 38 months. MCL 769.34(10) provides that a

sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the sentence. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). However, this limitation on review of sentences is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

In determining whether a punishment is cruel and unusual, one must look to the gravity of the offense and harshness of the penalty, compare the penalty to those imposed for other crimes, and consider the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Because defendant was sentenced within the sentencing guidelines range, his sentence is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Despite defendant's many positive attributes, the offense involved a serious sexual assault that has had a lasting effect on the victim. Under the circumstances, defendant has not overcome the presumption of proportionality. A proportionate sentence is not cruel or unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Therefore, defendant has not established a constitutional violation.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher